## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

DPI NEW ENGLAND,

Respondent,
and

Respondent,

\*
Case No. 1-CA-44833

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 25

Charging Party.

\*

# RESPONDENT'S REPLY TO THE COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF IN SUPPORT OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER

Respectfully Submitted,

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#### I. PROCEDURAL STATEMENT

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Respondent files the following Reply Brief to the Counsel for the General Counsel's Answer. This case was tried before the Honorable Paul Bogas ("ALJ"), in Boston, Massachusetts on February 9, 10, and 11, 2009. The ALJ issued his Decision on May 29, 2009. Respondent submitted its Exceptions<sup>1</sup> and Brief in Support of the Exceptions<sup>2</sup> on June 26, 2009. General Counsel filed its Answer to the Respondent's Exceptions and Brief in Support of the Decision of the Administrative Law Judge<sup>3</sup> and General Counsel's Limited Cross-Exceptions to the Decision of the Administrative Law Judge and Brief in Support Thereof<sup>4</sup> on July 17, 2009.<sup>5</sup>

<sup>&</sup>lt;sup>1</sup> Hereinafter referred to as "Exceptions."

<sup>&</sup>lt;sup>2</sup> Hereinaster referred to as "Brief" or "R. Brief."

<sup>&</sup>lt;sup>3</sup> Hereinafter referred to as "GC Answer."

<sup>&</sup>lt;sup>4</sup> Hereinafter referred to as "GC Cross-Exceptions" or "Cross-Exceptions."

<sup>&</sup>lt;sup>5</sup> The Respondent separately filed its Answer to the General Counsel's Cross-Exceptions.

<sup>&</sup>lt;sup>6</sup> The Respondent apologizes to the General Counsel and Board for any confusion that its four (4) typos may have caused. The General Counsel alleges additional typos. We exhaustively address these concerns within this Reply. (*See infra* Sec. III).

#### II. ARGUMENT

# A. THE GENERAL COUNSEL FAILED TO REBUT THE RESPONDENT'S ARGUMENTS REGARDING MACE UNDER BURNUP

In *Detroit Newspapers*, the Board assigned separate burdens to the Respondent and General Counsel when analyzing alleged unfair labor practices under *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964). 342 NLRB 223, 228 (2004). Under *Detroit Newspapers*, the Respondent's sole burden is to establish its "honest belief" that Mace had engaged in the misconduct for which he was lawfully discharged. *Id.* When it establishes that "honest belief," the burden shifts to the General Counsel to "affirmatively establish" that either Mace did not engage in that misconduct or that the punishment imposed on him was too severe. *Id.*; *Akal Security*, 354 NLRB No. 11 (2009). Driscoll's testimony satisfied the Respondent's burden. (Tr. 463-464, 471, 473-474; R. Brief, Sec. V.B., p. 31). The General Counsel did not meet its burden. (Exception 24).

The General Counsel argues that a "good faith belief" does not privilege an employer to discharge an employee for engaging in protected conduct. (GC Answer Sec. II.A.1), p. 12). We agree. However, the General Counsel misses the point. Pursuant to *Detroit Newspapers*, the Respondent merely argues that once it established its "honest belief," the burden shifted to the General Counsel to "affirmatively establish" Mace did not interfere with the work of others. The General Counsel did not do so. (*See infra* Sec. II.A.2)). Therefore, Respondent's "honest belief" was an "adequate defense." *See Rubin Bros. Footwear, Inc., et al.*, 99 NLRB 610, 611 (1952) *cited by Advance Industries Division*, 220 NLRB 431, 439 (1975). Accordingly, we ask the Board to reverse the ALJ's decision.

<sup>&</sup>lt;sup>7</sup> See R. Brief. Sec. V.B. for a complete analysis.

#### 1) Respondent Established Its "Honest Belief"

The ALJ improperly and incorrectly found that Driscoll's testimony was hearsay and insufficient to establish the Respondent's "honest belief." Driscoll's testimony was not hearsay. (R. Brief, Sec. V.B., p.31). Driscoll testified that Mace was discharged because, *inter alia*, he was interfering with the work of others. (Tr. 463-464, 471, 473-474; R. Brief, Sec. V.B., p. 31). Driscoll testified that he believed this was true because employees and supervisors had complained. (*Id.*). At trial, the ALJ ruled on two separate occasions that this testimony was not hearsay. (Tr. 465, 471-472; R. Brief, Sec. V.C. p. 33-34). He did so because it was not offered to prove the truth of the matter asserted (that Mace had actually engaged in misconduct), but rather to prove that the Respondent had "notice and knowledge of the complaints." (*Id.*). After ruling, the ALJ apparently changed his mind. He informed the parties of this change when he published his Decision. (ALJD 5:42-43; R. Brief, Sec. V.C., p.33-34).

The General Counsel states that the ALJ "[p]roperly recognize[ed] this evidence as hearsay" at trial, citing to Tr. 471:11-472:6. This is false. That transcript excerpt reads:

"...so that we're clear, I believe this is hearsay...with respect to the testimony that complaints were being received by these other supervisors...<u>it's not hearsay</u> with respect to Mr. Driscoll being told by supervisors that they were receiving complaints."

The Respondent offered the testimony to establish Driscoll's "notice and knowledge of the complaints." (Tr. 465, 471). The ALJ overruled the General Counsel's objections. (*Id.*). Pursuant to the ALJ's ruling, Driscoll's testimony was "not hearsay." That does not mean it

<sup>&</sup>lt;sup>8</sup> The Respondent will cite the ALJ's Decision as "ALJD [page#]:[line#]."

was hearsay with an exception. It means it was "not hearsay." In any event, even if it was hearsay, *Detroit Newspapers* clearly states that "The employer's 'honest belief' may be based on hearsay sources." 342 NLRB at 228-229. The ALJ ignored this precedent.

## 2) The General Counsel Failed To "Affirmatively Establish" That Mace Did Not Interfere With The Work Of Others

The General Counsel argues that Mace did not interfere with the work of others. Its only "affirmative" evidence is Mace's testimony that he was completing his own work. (GC Answer, Sec. II.A.1), p. 12). The General Counsel asserts that Mace also denied interfering with the work of others. (*Id.*). Mace never denied it. He testified only that he completed his own work. (Tr. 113-114, 117). In fact, Mace testified that Driscoll told him that "this [discharge] has nothing to do with [your] work." (Tr. 117). And when the ALJ chose to rely on Mace's testimony over Driscoll's, he referred to Mace's testimony that he was completing his own work. (ALJD 5:41-50). Even if Mace had denied interfering with the work of others, it would be merely a denial. A mere denial by an accused of wrongdoing cannot satisfy the General Counsel's affirmative burden.

The General Counsel's remaining arguments do not satisfy its affirmative burden.

The General Counsel argues that 1) the Respondent's no-solicitation policy was illegitimate,

2) that there was "no credible non-hearsay" evidence contradicting Mace's testimony, 3) that

"Respondent provided no documentary evidence to contradict Mace's testimony," and 4) that

"the record establishes that Mace did not engage in any misconduct." (GC Answer, Sec.

II.A.1), p.12-13). First, the Respondent's no-solicitation policy is irrelevant as to whether

<sup>&</sup>lt;sup>9</sup> In fn. 11 of its Answer, the General Counsel cited *Vencor Hospital-Los Angeles* to argue that the Board should adopt an ALJ's decision even where he or she inadvertently refers to evidence as hearsay that was admitted for non-hearsay purposes. *Vencor Hospital-Los Angels*, 324 NLRB 234 (1997). We agree. However, *Vencor* does not apply. The ALJ did not inadvertently *refer* to the evidence as hearsay. He deliberately *treated* it as hearsay. This was most notable when he found that Mace's testimony outweighed Driscoll's because "Driscoll's testimony is hearsay..." (ALJD 5:42-43). *Vencor* does not apply.

Mace interfered with the work of others. Second, Driscoll's testimony was not hearsay and was improperly discredited as hearsay. (*See supra* Sec. II.A.1). Third, it was not the Respondent's burden to produce evidence to contradict the General Counsel's witnesses, such as Mace. Rather, it was the Respondent's burden only to establish its honest belief, which it satisfied with Driscoll's testimony regarding employee and supervisor complaints. (Tr. 463-464, 471, 473-474). And fourth, while the General Counsel states that "the record establishes that Mace did not engage in any misconduct," it supports this with no citation to the record. This is insufficient to satisfy the General Counsel's burden. Accordingly, we ask the Board to reverse because the Respondent satisfied its burden, while the General Counsel did not satisfy its burden.

# B. THE GENERAL COUNSEL'S ANSWER DOES NOT REBUT THE RESPONDENT'S ARGUMENTS REGARDING BEATTIE, ADORNO, AND GLOVER UNDER WRIGHT LINE

The Respondent satisfied its burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), which was to establish that it would have done "what" it did, "when" it did, in the absence of protected union activity. *See We Can, Inc.*, 315 NLRB 170, 172 (1994) (ALJD 29:29-34). The Respondent showed how it met this burden in its Brief, Sec. III., specifically relying upon Board precedent in *Coyne International*, 326 NLRB 1187, 1193 (1998) (*see* R. Brief, Sec.III.C., p.23-24) and *Lampi LLC*, 327 NLRB 222, 222-223 (1998) (*see* R. Brief, Sec.III.F., p.29-30) and the Supreme Court's requirement in *Allentown Mack Sales and Service, Inc. v. N.L.R.B.*, 522 U.S. 359 (1998). (*see* R. Brief, Sec.III., p.17, 20, 23, 26, 28-29). The Respondent relies on Board precedent. The General Counsel attempts to rebut Board precedent with merely plausible arguments, without citing support from precedent. <sup>10</sup>

<sup>&</sup>lt;sup>10</sup> In the applicable section, the General Counsel cites only to *Structural Composites Industries*, *Harsco Corp.*, 304 NLRB 729, 729-730 (1991) in order to restate the applicable standard.

The General Counsel argues that the Respondent's Brief does not address its burden, but rather focuses on "[w]hether or not it could have lawfully terminated the employment of [Beattie, Adorno, and Glover]." (GC Answer, Sec. II.E., p. 19). The General Counsel makes a distinction without a difference. The Respondent argued that it satisfied its burden under Wright Line because its decision was lawful under Wright Line. (See R. Brief, Sec. III.B.) In particular, the Respondent did so relying on Coyne International, a case where the Board applied Wright Line to find that a respondent had met its burden. Coyne International, 326 NLRB at 1194 (see R. Brief Sec. III.C., p. 23).

Accordingly, we ask the Board to reverse the ALJ's decision regarding Beattie,

Adorno and Glover on the same grounds raised in Respondent's Brief. (R. Brief, Sec. III.).

#### III. ALLEGED ERRORS IN RESPONDENT'S BRIEF & EXCEPTIONS

The General Counsel devotes a significant portion of its Answer to address alleged errors in Respondent's brief. While Respondent admits there were four (4) typos between its Brief and Exceptions, the remaining alleged "errors" were misunderstandings by the General Counsel. This section addresses those typos and the misunderstandings.

For ease of reading, this section corresponds to the three sections of General Counsel's Answer where it raises its allegations of error: General Counsel's footnote 2; Section I.A.2) of its Answer; and Section II.B.2) of its Answer. Each section exhaustively responds to the General Counsel's allegations and in the order that it raises them. The Respondent hopes that this section will help redirect this case back to the merits of the substantive arguments.

#### A. GENERAL COUNSEL'S ANSWER, FOOTNOTE 2

Working and "Floating:" The General Counsel alleges that in **R. Brief, p. 3, para. 10**, Respondent "erroneously assert[ed]" that each driver works on a 2-week cycle, working four (4) days one week and three (3) days the next. The Respondent's statement and citation to Tr. 322-323 and 371-372 in that section are correct. Tr. 371-372 refers to "working" and "floating" as separate activities. The Respondent did likewise.<sup>11</sup>

Mace's Discharge (1<sup>st</sup> Typo): The General Counsel notes that in **R. Brief, p. 5, para.**22, the Respondent's citation to the transcript was incorrect regarding why Mace was discharged. The exhibit citation was correct. (GC Ex. 17). The transcript citation (Tr. 463) should be replaced with Tr. 116.

10 New Drivers: The General Counsel alleges that in **R. Brief, p. 8<sup>12</sup>, para. 22**, Respondent's "inference that 10 drivers were hired 'as a result' of the...'March Launch'" is not supported by Tr. 302. General Counsel is incorrect. Tr. 302 should be read in light of Tr. 301:25-302:1-8. The context supports the statement.

Complaints Received (2<sup>nd</sup> Typo): The General Counsel alleges that in **R. Brief, p. 17,** para. 94, Respondent "baldly claims" that Driscoll only received complaints about Mace from employees who did not work in the milk cooler with Mace. The Respondent made a typo. At **p. 17, para. 94**, Tr. 474-475 should be replaced with Tr. 477:8-25-Tr. 478:1-3.

June 2008 Announcement: The General Counsel alleges that, in reference to **R. Brief, p. 23 and Exception 45<sup>13</sup>**, "there is <u>no</u> support in the record for Respondent's repeated

<sup>&</sup>lt;sup>11</sup> See R. Brief, Sec. III.E. for a section where the Respondent treated "working" and "floating" equally as working days.

The General Counsel referred to page 6 in footnote 2, but it meant page 8.

<sup>&</sup>lt;sup>13</sup> The General Counsel referred to Exception 44 in footnote 2, but it meant Exception 45.

assertions...that an August business 'surge' was announced by Starbucks in June..." The General Counsel is incorrect. In **R. Brief, Sec. III.C.**, **p. 21-22** and in **Exception 45**, Respondent cites to and includes excerpts from Tr. 382-383 to support the follow statements of fact. The August 2008 surge was announced in June 2008. The first transcript excerpt on **p. 21** "show[s] the time period" for the rest of the excerpts, "June of '08." (*See* R. Brief, fn. 6; *see also* Tr. 382:12-13). And the remaining excerpts explain that during June of '08 "the company decided to proceed in phasing out short straight trucks" "in July" because "Starbucks had given [the Respondent] another piece of business... And it was very — it was big." All of this is supported by Tr. 382-383.

#### B. GENERAL COUNSEL'S ANSWER, SECTION I.A.2)

June 2008 Announcement: The General Counsel alleges in GC Answer, p. 4, that the June 2008 Announcement referenced in **Exceptions 2, 45, and 49** is unsupported by the record. The General Counsel is incorrect. (*See supra* Sec. III.A. regarding <u>June 2008</u>

<u>Announcement</u>)

Complaints from Starbucks (3<sup>rd</sup> Typo): The General Counsel alleges in GC Answer, p. 4, that in **Exception 4** "Respondent misrepresents the facts" when it states that Starbucks was complaining about the damaged product from straight trucks. The General Counsel is incorrect. Starbucks was making those complaints. The Respondent simply made a citation typo. The Respondent mistakenly used the citation regarding complaints from drivers (Tr. 326:9-18) instead of complaints from Starbucks (Tr. 380:14-18) (R. Brief, Sec. III.C., p. 25).

Rehiring and Reapplying: The General Counsel alleges in GC Answer, p. 4, that in **Exception 20** "Respondent misrepresents the record" when it states that the Respondent "had offered to rehire Beattie, Adorno and Glover." The General Counsel is incorrect. First,

Respondent cited Driscoll stating that he had hoped Beattie, Adorno, and Glover would get their Class A licenses. (Tr. 397:2-15). At Tr. 397:16-17, Driscoll was asked "Did you tell Mr. Glover that if he got his class A drivers license you'd hire him back 100%?" The ALJ sustained General Counsel's objection to the question. (Tr. 397:20-25). Thus, the Respondent next cited Glover's testimony that "Frank [Driscoll] said ...if I get my license for a class A, he was 100% sure he would hire me back." (Tr. 223:23-25-224:1).

Straight Truck Uses (4<sup>th</sup> Typo): The General Counsel notes in GC Answer, p. 4, that Respondent accidently omitted its citations from Exception 22. Exception 22 should have included citations for the "Jersey run" (Tr. 444:16-446:19) and "Recovery" (Tr. 446:20-25). [For the remaining Exceptions, General Counsel merely makes opposing arguments.]

#### C. GENERAL COUNSEL'S ANSWER, SECTION II.B.2)

"a short, but not necessarily unworkable time period": The General Counsel alleges in GC Answer, p. 20-21, that in **R. Brief**, **Sec. III.C.**, **p. 20**, Respondent "misstates the Decision when it claims that the Judge determined that the record showed that the two months 'from July 11 to September 15 was enough time to obtain [a] Class A license." The General Counsel is incorrect. On **p. 20**, the Respondent cited to ALJD 16:18-33. In ALJD 16:18-20, the ALJ wrote "the drivers were given from July 11 until September 15...that is a short, but not necessarily unworkable time period."

June 2008 Announcement: The General Counsel alleges in GC Answer, p. 21, that in R. Brief, Sec. III.C., p. 21-23, Respondent "misrepresents...the record" regarding the June 2008 announcement. The General Counsel is incorrect. (See supra Sec. III.A. regarding June 2008 Announcement)

Marques: The General Counsel alleges in GC Answer, p. 21, that in **R. Brief, Sec.**III.D., Respondent was incorrect that the Judge's Decision "conspicuously omit[ted]" from his analysis why Carlos Marques did not obtain his license in 6 ½ weeks. To rebut, General Counsel cites two sections of the Decision (ALJD 16:25-34 & 30:31-34). Neither rebuts. The ALJ stated the reasons why Marques took longer to get his license in his Decision's facts section (ALJD 16:25-34), but omitted them from his analysis (ALJD 30:31-34). Simply because the ALJ mentioned facts in his facts section does not mean he made all fairly demanded inferences from them. *Allentown Mack*, 522 U.S. at 378. We submit he did not.

Driver Schedules: The General Counsel alleges in GC Answer, p. 21-22, that in **R. Brief, Sec. III.E.**, Respondent was incorrect that the ALJ failed to consider the drivers' schedules. To rebut the Respondent, General Counsel cited to the Decision's facts section (ALJD 3:46-52) and analysis (ALJD 30:25-30). Only the facts section included the driver schedules. We submit that the ALJ's failure to analyze this fact evidenced his failure to make all fairly demanded inferences from it. *Allentown Mack*, 522 U.S. at 378.

#### IV. CONCLUSION

For the aforementioned reasons, and those stated in Respondent's Exceptions and Brief, the ALJ's Decision regarding Mace, Beattie, Adorno, and Glover should be reversed.

July 31, 2009

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#### **CERTIFICATE OF SERVICE**

This is to certify that a copy of Respondent's Reply to General Counsel's Answer to Respondent's Exceptions and Brief in Support of the Decision of the Administrative Law Judge was served this 31<sup>st</sup> day of July, 2009, by electronic mail and First Class mail, postage prepaid upon:

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